Supreme Court, U.S.
FILED
061268 MAR 16 2007
OFFICE OF THE CLERK

No. ____

IN THE
Supreme Court of the United States

ROBERT A. UNDERWOOD AND FRANK B. AGUON, JR.,
Petitioners,

v.

FELIX P. CAMACHO, MICHAEL CRUZ AND
THE GUAM ELECTION COMMISSION,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of Guam

PETITION FOR A WRIT OF CERTORARI

BRIAN J. FISCHER
JENNER & BLOCK LLP
919 Third Avenue
37th Floor
New York, NY 10022
(212) 891-1600

PAUL M. SMITH*
JENNER & BLOCK LLP
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000

Counsel for Petitioners

*Counsel of Record

QUESTION PRESENTED

Whether under the Organic Act of Guam, 48 U.S.C. § 1422, a vote cast improperly is nevertheless a "vote cast" for the limited purpose of determining whether candidates for Governor and Lieutenant Governor of Guam earned a "majority of the votes cast" necessary to win an election?

PARTIES TO THE PROCEEDING

Petitioners are Robert A. Underwood and Frank B. Aguon, Jr. Respondents are Felix P. Camacho and Michael Cruz and the Guam Election Commission.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES v

OPINION AND MEMORANDUM BELOW 1

JURISDICTION 2

STATUTES INVOLVED 2

STATEMENT OF THE CASE 3

A. Overvotes and the Requirement of Winning a Majority of "Votes Cast" 4

B. The 2006 Gubernatorial Election. 7

REASONS FOR GRANTING THE PETITION 10

I. THE PRIMARY REASON THAT OVERVOTES SUDDENLY WERE NOT COUNTED IN THE 2006 ELECTION WAS A SERIES OF MISREADINGS OF THIS COURT'S *GUTIERREZ* DECISION. 12

II. THIS CASE PRESENTS AN ISSUE THAT IS LIKELY TO RECUR AND SHOULD NOT BE LEFT UNRESOLVED. 14

III. THE PLAIN LANGUAGE OF THE ORGANIC ACT ARGUES STRONGLY IN FAVOR OF INCLUDING OVERVOTES IN THE VOTE BASE USED TO DETERMINE WHETHER A CANDIDATE HAS RECEIVED A MAJORITY OF VOTES CAST. 16

IV. THE SUPREME COURT OF GUAM'S EXCLUSION OF OVERVOTES IS INCOMPATIBLE WITH THE POLICY OBJECTIVES SUPPORTING SECTION 1422'S MAJORITY-VOTE REQUIREMENT. 21

CONCLUSION 24

APPENDIX A

OPINION
Underwood v. Guam Election Commission, WRM 06-003, 2006 WL 374313 (Sup. Ct. Guam Dec. 19, 2006)..... 1a

APPENDIX B

MEMORANDUM
From Cesar C. Cabot, Esq., Legal Counsel to Guam Election Commission, to Frederick J. Horecky, Chairman of Guam Election Commission and Gerald A. Taitano, Executive Director of Guam Election Commission (November 9, 2006)..... 26a

TABLE OF AUTHORITIES

CASES

Ada v. Government of Guam, 179 F.3d 672 (9th Cir. 1999), *rev'd on other grounds*, 528 U.S. 250 (2000) 7, 8, 12

Ada v. Government of Guam, No. Civ. 98-66, 1998 WL 1118593 (D. Guam Dec. 9, 1998), *aff'd*, 179 F.3d 672 (9th Cir. 1999), *rev'd*, 528 U.S. 250 (2000) 7

Bates v. United States, 522 U.S. 23 (1977) 17

Bush v. Gore, 531 U.S. 98 (2000) 20

County of Cass v. Johnston, 95 U.S. 360 (1877) 18

Foster v. Love, 522 U.S. 67 (1997) 19

Gore v. Harris, 772 So. 2d 1243 (Fla. 2000), *rev'd sub nom. Bush v. Gore*, 531 U.S. 98 (2000) 20

Gutierrez v. Ada, 528 U.S. 250 (2000) ..... *passim*

Haeuser v. Department of Law, 97 F.3d 1152 (9th Cir. 1996) 12

St. Paul Fire & Marine Insurance Co. v. Barry, 438 U.S. 531 (1978) 16

Todman v. Boschulte, 694 F.2d 939 (3d Cir. 1982) 11, 13

United States v. Classic, 313 U.S. 299 (1941) 19

STATUTES

28 U.S.C. § 1257(a) 2

48 U.S.C. § 1422 ..... *passim*

48 U.S.C. § 1424-2 2

48 U.S.C. § 1591 ..... 10, 11

Fla. Stat. § 102.168(3)(c) 20

3 G.C.A. § 11114 ..... 2, 8

3 G.C.A. § 11114(c) 6, 9

3 G.C.A. § 11114, Court Decisions 9, 12

3 G.C.A. § 11114 (1999) 12

Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339 (1958) 5, 16

Armed Services Members Voting Rights Protection, Pub. L. No. 108-376, 118 Stat. 2200 (2004) 18

Compact of Free Association, Pub. L. No. 99-239, 99 Stat. 1770 (1986) 5, 17

Compact of Free Association, Pub. L. No. 99-658, 100 Stat. 3672 (1986) 17

Guam Elective Governor Act, Pub. L. No. 90-497, 82 Stat. 842 (1968) 21

Hawaiian Statehood Act, Pub. L. No. 86-3, 73 Stat. 4 (1959) 5, 16

Northern Marianas Covenant, Pub. L. No. 94-241, 90 Stat. 263 (1976) 5, 16-17

Virgin Islands Elective Governor Act, Pub. L. No. 90-496, 82 Stat. 837 (1968) 21

LEGISLATIVE MATERIALS

Guam--Elective Governor: Hearings Before the Subcomm. on Territorial and Insular Affairs of the H. Comm. on Interior and Insular Affairs, 90th Cong. (1968) 5, 22, 23

Guam-Virgin Islands Elective Governors: Hearings Before the S. Territories and Insular Affairs Subcomm. and the S. Comm. on Interior and Insular Affairs, 90th Cong. (1967).....22

MISCELLANEOUS

Black's Law Dictionary (8th ed. 2004).....16

Megan Poinski, *V.I. Gubernatorial Runoff is Historic But Not Rare*, Virgin Islands Daily News, Nov. 9, 2006.....11

US Virgin Islands Set Runoff for Governor on 2-Vote Gap, Dow Jones Newswires, Nov. 19, 2006.....11

No. _____

IN THE

Supreme Court of the United States

ROBERT A. UNDERWOOD AND FRANK B. AGUON, JR.,
Petitioners,

v.

FELIX P. CAMACHO, MICHAEL CRUZ AND THE GUAM ELECTION COMMISSION,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of Guam

---

PETITION FOR A WRIT OF CERTORARI

Petitioners Robert A. Underwood and Frank B. Aguon, Jr., respectfully request that this Court issue a writ of certiorari to review the judgment of the Supreme Court of Guam.

OPINION AND MEMORANDUM BELOW

The decision of the Supreme Court of Guam, available at 2006 Guam 17 and 2006 WL 3747313, is reprinted at Appendix A.

The memorandum of Cesar C. Cabot, Esq., Legal Counsel to Guam Election Commission, to Frederick J. Horecky, Chairman of Guam Election Commission and Gerald A. Taitano, Executive Director of Guam Election

Commission, dated November 9, 2006, is unreported, and is reprinted at Appendix B.

JURISDICTION

The judgment of the Supreme Court of Guam was entered on December 19, 2006. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a) and 48 U.S.C. § 1424-2 (as amended in 2004).

STATUTES INVOLVED

The Organic Act of Guam, 48 U.S.C. § 1422, states in pertinent part:

> The executive power of Guam shall be vested in an executive officer whose official title shall be the "Governor of Guam". The Governor of Guam, together with the Lieutenant Governor, shall be elected by a majority of the votes cast by the people who are qualified to vote for the members of the Legislature of Guam. The Governor and Lieutenant Governor shall be chosen jointly, by the casting by each voter of a single vote applicable to both offices. If no candidates receive a majority of the votes cast in any election, on the fourteenth day thereafter a runoff election shall be held between the candidates for Governor and Lieutenant Governor receiving the highest and second highest number of votes cast. The first election for Governor and Lieutenant Governor shall be held on November 3, 1970. Thereafter, beginning with the year 1974, the Governor and Lieutenant Governor shall be elected every four years at the general election. The Governor and Lieutenant Governor shall hold office for a term of four years and until their successors are elected and qualified.

Title 3 of the Guam Code Annotated, section 11114 provides:

If a voter indicates either:

(a) by placing the voter's marks in the voting ovals or other spaces adjacent to the names of any candidates or nominees;

(b) by writing the names of persons for an office in the blank spaces, or

(c) by a combination of both, the choice of more than there are candidates or nominees to be elected or certified for any office, or if for any reason it is impossible to determine the voter's choice for any office, the voter's ballot shall not be counted for that office, but the rest of the voter's ballot, if properly marked, shall be counted. A ballot that is blank, or that is marked with more candidates or nominees than are to be nominated or elected, is not to be included as a part of the base for determining what constitutes a majority in each election requiring a candidate or nominee to garner a majority of votes in order to be nominated or elected.

STATEMENT OF THE CASE

Petitioners Robert A. Underwood and Frank B. Aguon, Jr., ("Petitioners" or, collectively, "Underwood") were candidates for Governor and Lieutenant Governor, respectively, in the Territory of Guam's 2006 General Election. They seek review of the Supreme Court of Guam's decision refusing to direct the Guam Election Commission (the "Election Commission") to conduct a runoff gubernatorial election due to the failure of any slate to receive a "majority of the votes cast" as required by the Guam Organic Act, 48 U.S.C. § 1422. At issue is whether votes cast improperly--so-called "overvotes"--were lawfully excluded from the total pool of votes used in determining whether Respondents Felix P. Camacho and Michael Cruz

("Respondents" or, collectively, "Camacho") received a majority of all votes cast, thus avoiding a runoff.

When they ran for office, Petitioners had every reason to expect that the winning candidates would need to earn a majority of all votes cast in the gubernatorial election, including overvotes, since that was the consistent prior practice in Guam. But the Election Commission changed that practice, and this change was upheld by the Supreme Court of Guam, largely as a result of confusion about the meaning of this Court's prior decision in *Gutierrez v. Ada*, 528 U.S. 250, 252 (2000) ("*Gutierrez*"). As we show, *Gutierrez* did not speak at all to the issue at hand. It thus provided no valid justification for changing the rules after the election and suddenly disregarding the strong arguments for reading the Guam Organic Act as demanding that overvotes be counted.

Given that the outcome of gubernatorial elections in Guam and the Virgin Islands (which has a nearly identical statute) frequently turns on a proper interpretation of the majority-vote requirement, the Court should take this opportunity to assure that the Guam Organic Act is correctly and definitively construed. Absent such a clarification, there is a very real prospect that the next election will again be litigated but this time in federal court, possibly producing yet another after-the-fact change in the rules of the game. That kind of uncertainty, especially when it is spawned by a misreading of this Court's prior decision and risks delaying the finality of future gubernatorial elections, ought to be avoided by a grant of review here.

A. Overvotes and the Requirement of Winning a Majority of "Votes Cast".

When it passed the Guam Elective Governor Act in 1968 as an amendment to the Guam Organic Act, thus allowing Guam to elect its governor for the first time, Congress

expressly mandated that there would be a runoff in any election where no candidate received an absolute majority of the "votes cast." 48 U.S.C. § 1422. The legislative history indicates that this requirement was inserted because of concerns about factionalism. For example, in a hearing on the Elective Governor Act, a Guam attorney, referring to the presence of three viable political parties in the Territory and expressing his endorsement of a majority-vote requirement, testified: "I believe that the Governor should receive the mandate of a majority vote, not a plurality vote as are being now enjoyed by other States or countries. To me I believe an endorsement of the majority is more proper than a mere plurality vote . . . [T]o me [it is] a better system that the one who has the highest office in Guam should receive the mandate of the majority." *Guam--Elective Governor: Hearings Before the Subcomm. on Territorial and Insular Affairs of the H. Comm. on Interior and Insular Affairs*, 90th Cong. 12 (1968) (statement of Alberto T. Lamorena). Moreover, in codifying that view, Congress did not choose to phrase the majority-vote rule as requiring a majority of "legal votes" or "valid votes", as it has done in other similar laws passed both before and since. *See, e.g.*, Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339 (1958); Hawaiian Statehood Act, Pub. L. No. 86-3, 73 Stat. 4 (1959); Northern Marianas Covenant, Pub. L. No. 94-241, 93 Stat. 263 (1976); Compact of Free Association, Pub. L. No. 99-239, 99 Stat. 1770 (1986).

Overvotes, also deemed "spoiled ballots", may occur in multiple situations, including: when a voter has cast votes for multiple named candidates; when a voter has marked off one named candidate and written in a second different name; or when a voter has marked off one named candidate and written in that same candidate's name. Overvotes can be an intentional form of protest but most often occur inadvertently. They can also be the product of fraud,

including when a voter's selection on a paper ballot is effectively negated by another person marking off an additional candidate.

From the time of Guam's first gubernatorial election until 2006, the Election Commission always treated overvotes as part of the pool of votes for purposes of applying the majority-vote requirement. *See* Pet. App. 24a n.4.[1] That makes sense because overvotes reflect voters who tried but failed to participate in the gubernatorial election or deliberately cast an invalid vote as a form of protest. They were therefore part of the electorate for that election, even if their votes did not end up in the column of any individual candidate. Such a rule is also consistent with the undisputed practice of counting for majority-vote purposes all write-in votes, even if cast as a protest vote or for a cartoon character.

By contrast, the Election Commission did not always count undervotes, which reflect voters who participated in other elections but did nothing with regard to the gubernatorial election. For example, in the 1998 election, it counted overvotes and not undervotes. *Gutierrez*, 528 U.S. at 252 (2000) ("*Gutierrez*"). As a result, when the 1998 election result was challenged by losing candidates seeking a

---

[1] In the opinion below, the Supreme Court of Guam wrote that "[w]e also reject Underwood/Aguon's related argument that 3 GCA § 11114 should not be complied with because of the [Election] Commission's historical practice of *not* including overvotes in determining whether a gubernatorial slate has garnered the requisite majority. We agree with Camacho/Cruz that failure to enforce the law in prior elections does not forgive the failure to follow the law in this election." Pet. App. 24a n.4 (underscore added). The italicized "not" is an obvious typographical error, and must be read out in order for the quoted sentences to make sense both independently and in the context of the opinion. The Guam law supposedly not being complied with, as amended in 2000 following *Gutierrez*, specifically *excludes* overvotes in determining whether a gubernatorial team has reached a majority of the votes. 3 Guam Code Ann. § 11114(c).

runoff, the focus was entirely on the failure of the Election Commission to count undervotes. The argument there was that in section 1422, by demanding a "majority of the votes cast *in any election*" (emphasis added), Congress signified that the pool should include any voter who cast a vote for any office on the same day as the gubernatorial election. That argument prevailed in the district court, *Ada v. Government of Guam*, No. Civ. 98-66, 1998 WL 1118593 (D. Guam Dec. 9, 1998), and the Ninth Circuit Court of Appeals, *Ada v. Government of Guam*, 179 F.3d 672, 675 (9th Cir. 1999), but it was rejected by this Court. In *Gutierrez*, the Court held that because Congress used the term "votes cast" rather than "ballots cast", the statute does not call for inclusion in the pool of persons who never even attempted to participate in the gubernatorial election, just because they voted in some other election the same day. 528 U.S. at 255-56. The Court added that the phrase "in any election" was not properly read as referring to elections other than those for governor. *Id.* at 255-58.

B. The 2006 Gubernatorial Election.

Eight years after the election at issue in *Gutierrez*, Petitioners Underwood and Aguon received 18,700 votes in the November 7, 2006 general election. Pet. App. 3a. Respondents Camacho and Cruz received 19,560 votes. *Id.* An additional 668 write-in votes were reported, along with 504 overvotes. *Id.* At a November 9, 2006 Election Commission meeting, counsel for the Election Commission submitted a memorandum entitled *Interpretation of the Term 'Majority of Votes Cast' Pursuant to the Organic Act of Guam, 48 U.S.C. § 1422 and 3 GCA § 11114(c)* (the "Election Commission Opinion").[2] Pet. App. 4a. That

[2] Memorandum from Cesar C. Cabot, Esq., Legal Counsel to Guam Election Commission, to Frederick J. Horecky, Chairman of Guam

opinion advised that the Guam Organic Act, Guamanian law and this Court's decision in *Gutierrez* compelled excluding overvotes from the vote pool in determining whether any one slate received a "majority of the votes cast" under section 1422. The next day, relying on the counsel opinion and departing from established prior practice, a divided Election Commission voted to exclude overvotes and certified the Camacho slate as the election winner. In so doing, the Election Commission found that Camacho received 19,560 out of 38,928 votes, or 50.25%. Had the Election Commission included overvotes in the vote base, Camacho, with only 49.60% of 39,432 votes, would not have been declared victorious, and, in accord with section 1422, a runoff election would have been conducted within days. Pet. App. 4a.

On November 13, 2006, Underwood filed a Petition for a Writ of Mandamus with the Supreme Court of Guam seeking a runoff, asserting that because no gubernatorial slate obtained the necessary majority of votes cast in the general election, the Election Commission's certification of a winner violated section 1422. On December 19, 2006, the Supreme Court of Guam denied that petition, holding that section 1422 bars overvotes from the total vote count. Pet. App. A.

In so ruling, the court noted that the Guam Legislature had recently amended the statute defining overvotes, Title 3 of the Guam Code Annotated ("G.C.A."), § 11114. That statute had previously provided that an overvote would not be counted in favor of any single candidate, without specifying whether overvotes are in the majority-vote pool. *See Ada v. Government of Guam*, 179 F.3d 672, 682 (9th Cir. 1999), *rev'd on other grounds*, 528 U.S. 250 (2000). But five months following the *Gutierrez* decision, the Guam

---

Election Commission and Gerald A. Taitano, Executive Director of Guam Election Commission (November 9, 2006). Pet. App. B.

Legislature changed section 11114, acting, as described by the editor of the codification, as it thought necessary to "reflect the holding in *Gutierrez*, U.S. Supreme Court, reversing District Court of Guam and 9th Circuit Court of Appeals by a unanimous decision." 3 G.C.A. § 11114, Court Decisions. The pertinent amendment added to subsection (c) the following new language:

> A ballot that is blank, or that is marked with more candidates or nominees than are to be nominated or elected, is not to be included as a part of the base for determining what constitutes a majority in each election requiring a candidate or nominee to garner a majority of votes in order to be nominated or elected.

3 G.C.A. § 11114(c). Thus, from all appearances, the legislature provided that overvotes would not be in the majority-vote pool because it mistakenly believed that such a rule was needed to conform to *Gutierrez*.

The Supreme Court of Guam did not treat this statute as directly controlling because it recognized "that the Guam Legislature cannot enact laws which are in derogation of the provisions of the Organic Act," which functions as Guam's constitution. Pet. App. 7a. The statute, however, led the court to recognize a presumption in favor of the constitutionality of excluding overvotes from the majority-vote pool. *Id.* 21a-22a. And when the court construed the term "votes cast" in section 1422 of the Organic Act, it concluded that Congress did not mean to include votes cast improperly, either by mistake or on purpose, in determining whether any candidate received a majority of the vote. Like the Guam Legislature, it too drew support for this rule from *Gutierrez*, apparently seeing no significant difference between (1) excluding voters who never participated in the gubernatorial election at all (the issue in *Gutierrez*) and (2)

excluding voters who tried to vote but made a mistake or who voted twice as a form of protest:

> Accordingly, we hold that the 504 persons who did not express a choice or selection of a Governor and Lieutenant Governor in the November 7, 2006 General Election have assented to the will of those thousands of voters who have properly expressed their will and duly participated in such election.
>
> In so holding, we construe the Organic Act to require that the Governor and Lieutenant Governor of Guam be elected by a "majority of all those who cared to make any choice among gubernatorial candidates." *Gutierrez*, 528 U.S. at 256.

Pet. App. 11a.

REASONS FOR GRANTING THE PETITION

This case presents a significant and recurring question that this Court should resolve. The Supreme Court of Guam's equation under section 1422 of overvotes with complete voter abstentions from the gubernatorial race, which allowed a finding that Camacho held a majority and not a mere plurality of votes, is unprecedented and sanctions a reversal of past Guamanian practice taken because of a misapprehension of the Court's *Gutierrez* decision. If Guam's highest court as well as its legislature and Election Commission are all mistaken about the import and reach of *Gutierrez* with respect to overvotes, as Petitioners contend they are, only this Court can set them right.

Moreover, the misinterpretation of *Gutierrez* and section 1422 should be corrected now rather than later, for three reasons. First, this unresolved question impacts not only Guam and its most recent and future elections, but the Virgin Islands as well. Under the Revised Organic Act of the Virgin Islands, 48 U.S.C. § 1591, a runoff election for Governor and

Lieutenant Governor is required "[i]f no candidates receive a majority of the votes cast in any election." That language, identical to the language found in section 1422, has also been the subject of dispute. *See Todman v. Boschulte*, 694 F.2d 939 (3d Cir. 1982).

Second, it is quite likely that another case raising this same issue will arise in the near future. Two of the last three Guamanian elections have seen the smallest of margins separating the Democratic and Republican teams. The Virgin Islands' most recent general election, also held in November of 2006, nearly implicated the "majority of the votes cast" provision as well. There, none of the three Governor/Lieutenant Governor slates earned a majority of the votes cast; the closest a slate came was 49.33%. Pursuant to 48 U.S.C. § 1591, a runoff election was held.[3]

Third, denying review will leave in place an intolerable level of uncertainty about the basic rules governing Guam's electoral system. In the next election raising the overvote issue, the losing side will surely litigate the issue again, but this time in the Guam federal district court. That court will not be bound by the Supreme Court of Guam's reading of the Organic Act, which is after all a *federal* statute. And, as we show *infra*, there are good reasons for anticipating that the next decision will go back to including overvotes in the majority-vote pool. Rather than leave such uncertainty in place, it would be far preferable for an Article III court--*i.e.*, this Court--to address this issue of federal law definitively now.

---

[3]*See* Megan Poinski, *V.I. Gubernatorial Runoff is Historic But Not Rare*, The Virgin Islands Daily News, Nov. 9, 2006; *US Virgin Islands Set Runoff for Governor on 2-Vote Gap*, Dow Jones Newswires, Nov. 19, 2006.

I. THE PRIMARY REASON THAT OVERVOTES SUDDENLY WERE NOT COUNTED IN THE 2006 ELECTION WAS A SERIES OF MISREADINGS OF THIS COURT'S *GUTIERREZ* DECISION.

The Supreme Court of Guam's holding that this Court's rationale in *Gutierrez* dictates exclusion of overvotes from the vote base raises an important question about *Gutierrez*'s meaning and reach. Indeed, it represented Guam's third official misreading of *Gutierrez* to hold that overvotes must be disregarded contrary to the Territory's history of including overvotes in the section 1422's vote base.

Prior to *Gutierrez*, Guamanian law, which is "constrained by the Organic Act" (Pet. App. 7a, quoting *Haeuser v. Dep't of Law*, 97 F.3d 1152, 1156 (9th Cir. 1996)), barred overvotes from counting for any one candidate, but did not exclude them from section 1422's vote base. 3 G.C.A. § 11114 (1999), amended by Guam Pub. L. No. 25-146:46 (May 27, 2000); *Ada v. Government of Guam*, 179 F.3d at 682, *rev'd on other grounds*, 528 U.S. 250 (interpreting pre-amendment section 11114). The post-*Gutierrez* amended version of section 11114 "clearly requires" the exclusion of overvotes from the vote base. Pet. App. 23a.[4] The new exclusion was added by the Guam Legislature to, at least in part, "reflect" *Gutierrez*. 3 G.C.A. § 11114, Court Decisions. That misreading of *Gutierrez* led to another. Following the 2006 election, the Election Commission, acting on advice of its counsel, certified Respondents as the election winners by not counting overvotes in the vote base. The Election Commission's counsel found the exclusion of overvotes to "be in accord with the U.S. Supreme Court's ruling in

[4] As Petitioners maintain that overvotes are considered "votes cast" under section 1422, 3 G.C.A. § 11114 impermissibly conflicts with the Guam Organic Act and is therefore invalid. *Haeuser v. Dep't of Law*, 97 F.3d 1152, 1156 (9th Cir. 1996); Pet. App. 7a-8a.

Gutierrez." Pet. App. 30a. Previously, the Election Commission counted overvotes in the denominator when determining whether a majority of the vote had been reached. *See Gutierrez*, 528 U.S. at 252.

The Commission's new position led to this litigation in which the Supreme Court of Guam claimed to find support for exclusion of overvotes in *Gutierrez*. On the one hand, the Supreme Court of Guam acknowledged that the "Ninth Circuit court's reference to overvotes was not necessary to the adjudication of the case." Pet. App. 15a. It was "therefore regard[ed] . . . as dicta . . . . [as t]he Ninth Circuit *Ada* case . . . clearly was not argued and not decided on the issue of overvotes." *Id.* 15a-16a. On the other hand, despite its recognition that overvotes were not at issue in *Ada*, the Supreme Court of Guam found that this Court's reversal of the Ninth Circuit in *Gutierrez* somehow did address the overvote issue. *Id.* 17a-18a.

Overvotes were not before the Court in *Gutierrez*, and the Supreme Court of Guam's reliance on the case is misplaced.[5] The rationale Petitioner's advance to support counting overvotes in the vote base is not the one rejected in *Gutierrez* -- *i.e.*, the notion that the statutory term "votes cast" equates with "ballots cast" for any office on the same day as the gubernatorial election. Petitioners maintain that overvotes are "votes cast" because they reflect voters who participated

---

[5] In addition to a plain reading of the *Gutierrez* decision, the Court's explanation for granting certiorari in that case--"to resolve a split between the Ninth Circuit's interpretation of the Organic Act of Guam and the Third Circuit's reading of identical language in the Revised Organic Act of the Virgin Islands" (528 U.S. at 254)--establishes that *Gutierrez* did not concern overvotes. The Third Circuit in *Todman*, the case occupying one side of the divide, expressly stated that "we need not reach the question of whether the 'votes cast' language . . . includes spoiled ballots." 694 F.2d at 941.

in the gubernatorial election itself, albeit failing to cast *valid* votes that could be credited to a candidate. *Gutierrez* did not focus on the breadth of the term "votes cast." Indeed, the Supreme Court of Guam's effort to define a "vote cast" by invoking a series of unrelated cases from this Court dating back to 1877 makes manifest that *Gutierrez* is silent on whether overvotes are "votes cast" pursuant to section 1422. Pet. App. 8a-12a. *Gutierrez* instead focused principally on the words "in any election" in section 1422.[6] Here, Petitioners contend that the Election Commission need not look beyond the number of registered voters who made markings in the gubernatorial portion of the 2006 general election ballot. Petitioners' position is therefore entirely consistent with and supported by *Gutierrez*'s reading of "any election" to mean the "election for Governor and Lieutenant Governor." *Gutierrez*, 528 U.S. at 254-55.

II. THIS CASE PRESENTS AN ISSUE THAT IS LIKELY TO RECUR AND SHOULD NOT BE LEFT UNRESOLVED.

The question presented here, involving as it does a basic rule governing how votes will be counted in at least two different territories, should not be left unaddressed. As noted above, recent history suggests that we will very soon see another election close enough so that it will again matter whether overvotes are or are not part of the pool of votes considered in applying the majority-vote requirement. Moreover, denying review, far from leaving matters settled,

---

[6] According to the Court, "[t]he question [in *Gutierrez* was] whether [section 1422] compels a runoff election when a candidate slate has received a majority of the votes cast for Governor and Lieutenant Governor, but not a majority of the number of ballots cast in the simultaneous general election." *Gutierrez*, 528 U.S. at 251. The Court stated that "[t]he key to understanding what the phrase 'in any election' means is also the most salient feature of the provision in which it occurs." *Id.* at 254.

will only serve to set the table for yet another litigated election outcome.

The reason is that the Supreme Court of Guam does not have the final say on the interpretation of the Organic Act, even in Guam. As that court put it in the decision here on review:

> The Organic Act has the unique distinction of being Guam's *de facto* constitution, and, at the same time, a federal law. This creates the anomalous situation wherein two separate and independent court systems -- the federal and local courts -- have original jurisdiction over questions arising under the Organic Act and could conceivably render opposing opinions.

Pet. App. 13a (internal citation omitted).

Because Guam's "constitution" is a statute passed by Congress, the next party aggrieved by the Election Commission's application of the majority-vote requirement will have the option of proceeding into federal court and arguing the issue afresh. When that occurs, there is every reason to anticipate that the result may be yet another change in the basic electoral rules. After all, as we note *infra*, the ruling below has little to recommend on the merits, once the erroneous reading of *Gutierrez* is corrected. But in the meantime, candidates and voters will have to proceed without knowing a definitive answer. This kind of legal question, going to the heart of the process by which Guam's chief executive is elected, ought not be left unresolved until another electoral crisis presents itself.

III. THE PLAIN LANGUAGE OF THE ORGANIC ACT ARGUES STRONGLY IN FAVOR OF INCLUDING OVERVOTES IN THE VOTE BASE USED TO DETERMINE WHETHER A CANDIDATE HAS RECEIVED A MAJORITY OF VOTES CAST.

"The starting point" in arriving at the meaning of "majority of votes cast" under section 1422 "is the language [of the statute] itself." *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 541 (1978). By its plain language, an overvote is a "vote cast" under section 1422. A spoiled ballot, such as each ballot containing an overvote here, is "[a] ballot reflecting a *vote* that cannot be counted because it was *cast* in a form or manner that does not comply with the applicable rules." *Black's Law Dictionary* 153 (8th ed. 2004) (emphasis added).[7] The Supreme Court of Guam failed to respect the distinction between votes that are *cast* and votes that are *counted* for any one candidate.

If Congress had intended to exclude overvotes from the term "votes cast", it could easily have done so. If, in using the phrase "votes cast", Congress actually meant "votes counted", it could have drafted section 1422 accordingly. When Congress has intended to restrict the term "votes cast" in such a manner, it has done so, both before and after section 1422 was enacted. In the Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339 (1958), a referendum submitted to Alaskans concerning Alaska's admission into the Union as a state required a "majority of the *legal* votes cast" § 8, 72 Stat. 344 (emphasis added). That same language was used by Congress in a referendum concerning Hawaii's statehood in the Hawaiian Statehood Act, Pub. L. No. 86-3, § 7, 73 Stat. 4, 7 (1959). Similar language was employed in the Northern

---

[7] Similarly, an "unintelligible vote" is "[a]n otherwise legal *vote cast* in a form from which the tellers cannot ascertain the voter's intent." *Black's Law Dictionary* 1607 (8th ed. 2004) (emphasis added).

Marianas Covenant, Pub. L. No. 94-241, § 1001, 90 Stat. 263, 277 (1976), in which Congress mandated "a majority of at least 55% of the *valid* votes cast" for a vote to approve the Covenant of the Northern Mariana Islands (emphasis added). Congress has also used the modifier "valid" when referring to "ballots cast" in certain elections. *See* Compact of Free Association, Pub. L. No. 99-239, 99 Stat. 1770 (1986) (requiring a "majority of the valid ballots cast" in the Federated States of Micronesia); Compact of Free Association, Pub. L. No. 99-658, 100 Stat. 3672 (1986) (for the Republic of Palau, also requiring a "majority of the valid ballots cast").[8]

A construction of section 1422's "votes cast" that would exclude overvotes would require the Court to add language--such as "votes counted", or "legal votes cast", or "valid ballots cast"--that simply does not appear in the statute. That kind of judicial rewriting is disfavored. *See, e.g.*, *Bates v. United States*, 522 U.S. 23, 29 (1977) (". . . [W]e ordinarily resist reading words or elements into a statute that do not appear on its face"); *Gutierrez*, 528 U.S. at 255-56 (observing that "[s]urely a Congress that meant to refer to ballots, midway through a statute repeatedly referring to 'votes' for gubernatorial slates, would have said 'ballots'"). It ought to be up to Congress, not the Supreme Court of Guam, to decide the policy question whether it makes sense to lower the majority-vote requirement by excluding overvotes from the pool. Indeed, Congress has shown the

---

[8] In *Gutierrez*, the Court distinguished between elections for office and referenda in assessing assorted state cases that required "a majority of voters going to the polls, not a mere majority of persons voting on a particular referendum issue." 528 U.S. at 256. That distinction does not provide a meaningful explanation here for why Congress chose to use the adjectives "legal" and "valid" in one context and not the present one if it actually meant the same thing in both instances.

ability to make such adjustments. For example, it recently eliminated the requirement of a majority-vote for the office of Delegate from American Samoa, unless and until the Legislature of American Samoa creates a system of primary elections for that office. *See* Armed Services Members Voting Rights Protection, Pub. L. No. 108-376, 118 Stat. 2200 (2004) (amending 48 U.S.C. § 1732(d)).

Certainly there is nothing in the reasoning of the Supreme Court of Guam suggesting that it had good reason to exclude overvotes for purposes of determining whether Respondents received a majority of votes cast. It relied on two unpersuasive arguments. First, it equated persons who cast votes in the gubernatorial election improperly with persons who did not vote at all. That false analogy is apparent not only in the court's reliance on *Gutierrez* but also in its discussion of *County of Cass v. Johnston*, 95 U.S. 360 (1877). There, this Court held that *non*-voters should not be counted in determining whether a bond issue had received the legally required "two-thirds of the qualified voters of the township." 95 U.S. at 365. The Supreme Court of Guam extracted incorrectly from *Cass* "[t]he general principle . . . that where a voter does not express his will in an election, he assents to those voters who do." Pet. App. 8a. But nothing in *Cass* begins to support the proposition that persons who cast overvotes (as opposed to non-voters) are properly excluded from consideration for purposes of the majority-vote rule. Consider the prototypical case of a voter who votes for a candidate and then, out of excessive enthusiasm, also writes in that same candidates name. Such a vote may not be properly counted for the preferred candidate, but that voter certainly did not "assent" to be excluded from the electorate for purposes of the majority-vote rule.

Second, the Supreme Court of Guam relied on cases supporting the proposition that the purpose of an election is

to make a "choice" among candidates. *See* Pet. App. 8a-12a (citing *Newberry v. United States*, 256 U.S. 232 (1921); *United States v. Classic*, 313 U.S. 299 (1941); *Foster v. Love*, 522 U.S. 67 (1997); *Bush v. Gore*, 531 U.S. 98 (2000); and *Burdick v. Takushi*, 504 U.S. 428 (1992)). But those cases obviously provide no real insight as to the intent of Congress when it chose to mandate that Guam gubernatorial candidates receive a majority of "votes cast."[9] They are simply a make-weight part of the court's analysis.

Particularly ironic is the court's reliance on *Burdick*, where this Court addressed whether there is a constitutional right to the opportunity to cast a write-in vote. As noted above, Guam's gubernatorial ballot provides for write-in voting, and it is uncontested that all of the 668 write-in votes in the 2006 gubernatorial election are included in the vote base, regardless of their content. Those votes may well be non-final in nature, or expressions of a non-choice, or

---

[9] In *United States v. Classic*, for example, the Court held that "the right of voters at [a Congressional] primary [election] to have their votes counted is . . . a right or privilege secured by the Constitution." 313 U.S. 299, 325 (1941). The Supreme Court of Guam's equation of overvotes with abstentions and non-participation is inconsistent with *Classic*'s strengthening of the "right of the elector to have his ballot counted." *Id.* at 318. In refusing to acknowledge that those who overvoted took electoral action along with those who had their votes counted, the Supreme Court of Guam erroneously narrowed that right of participation under Guam's Organic Act (the Territory's constitution) and ignored this Court's admonition that "[w]ords, especially those of a constitution, are not to be read with such stultifying narrowness." *Id.* at 320. In *Foster v. Love*, although the Court noted that an election involves combined voter action "*meant* to make a final selection of an officeholder", (522 U.S. 67, 71 (1997) (emphasis added)), section 1422's requirement of a "majority of the votes cast", and not a simple plurality, and its recognition of the possibility of and provision for a runoff, demonstrate that a contest for office need not end in the "final selection" of an officeholder to be an election.

expressions of discontent or some other display; they may include votes for fictional characters, or the deceased, or persons not legally qualified to serve as Governor and Lieutenant Governor of Guam. There is no suggestion in the record that such votes of the evidently discontented--which appear to fall outside the Supreme Court of Guam's definition of a "vote cast"--are excluded from section 1422's vote base. The Supreme Court of Guam failed to provide any explanation for why under its own construction of section 1422 such write-in votes are swept into the base while overvotes are swept out.[10]

---

[10] The Supreme Court of Guam's reliance on *Bush v. Gore*, 531 U.S. 98 (2000) and *Gore v. Harris*, 772 So. 2d 1243 (Fla. 2000), *rev'd sub nom. Bush v. Gore*, 531 U.S. 98 (2000), as support for its reading of section 1422 was also particularly unpersuasive. Pet. App. 9a-10a. First, those cases involved the counting of votes in favor of specific candidates in a plurality-rule election, not, as we have here, a question of whether a category of votes populates the vote pool under a majority-rule federal statute. Second, the injunction that "[i]n certifying election results, the votes eligible for inclusion in the certification are the votes meeting the properly established legal requirements" only begs the question further of what are those "legal requirements" under section 1422. Pet. App. 9a (quoting *Bush*, 531 U.S. at 103). The "clear indication of the intent of the voter" standard cited by the Supreme Court of Guam is one rooted in Florida statutory law, and finds no analog in section 1422. In any case, it is clear that a voter who returns a ballot overvoted on the gubernatorial portion of the ballot intended to be counted in some way in that contest, and not ignored entirely. Third, as the Supreme Court of Guam noted, Florida law distinguishes between "illegal votes" and "legal votes" in conferring "grounds for contesting an election." Pet. App. 10a; Fla. Stat. § 102.168(3)(c). That law demonstrates the capacity of legislatures to distinguish among types of votes. Congress drew no such distinction in section 1422.

IV. THE SUPREME COURT OF GUAM'S EXCLUSION OF OVERVOTES IS INCOMPATIBLE WITH THE POLICY OBJECTIVES SUPPORTING SECTION 1422'S MAJORITY-VOTE REQUIREMENT.

The legislative history underlying section 1422 reveals a deliberate decision on Congress's part to see that Guam's Governor and Lieutenant Governor earn a real majority, and not a simple plurality, of votes cast. The choice was taken with an understanding that difficulty choosing candidates for those offices and a runoff election could well result. That history supports a broader reading of "votes cast" than that given by the Supreme Court of Guam.

The pertinent portion of the provision at issue was enacted in 1968 through the Guam Elective Governor Act. *See* Guam Elective Governor Act, Pub. L. No. 90-497, 82 Stat. 842 (1968). The Virgin Islands' identical majority-rule Elective Governor Act was passed that same year. *See* Virgin Islands Elective Governor Act, Pub. L. No. 90-496, 82 Stat. 837 (1968). In considering those Acts, the "majority of the votes cast" requirement was specifically deliberated. At a hearing concerning the Guam and Virgin Islands Elective Governors Acts, Augustin Doward, Minority Leader in the Virgin Islands Legislature, objected to the legislation's requirement that a runoff occur if no gubernatorial candidate received a "majority of the votes cast", stating:

> [I]nstead of a majority, we feel that a simple plurality should suffice in determining who is going to be Governor. Our reason for this is that the Virgin Islands elections at times are very close. It is conceivable that no one individual would get a majority of votes during the election. This would necessitate a run-off which is not only costly for the government but also very costly for the candidates.

> In this present day and age campaigning is very, very expensive in the Virgin Islands and we feel we should do whatever is possible to avoid this.

Guam-Virgin Islands Elective Governors: Hearings Before the S. Territories and Insular Affairs Subcomm. and the S. Comm. on Interior and Insular Affairs, 90th Cong. 45-46 (1967).

The Subcommittee Chairman, Senator Quentin Burdick, responded to this objection by inquiring of Mr. Doward: "[Y]ou have two parties now . . . suppose you should have a third party growing up in the Islands. Suppose you have an election and one party receives 34 percent of the vote which is the most votes. Would you say that there should not be a run-off in that case?" *Id.* at 46. Mr. Doward restated his preference, but noted it was not a strong one. *Id.*

A similar deliberation occurred in the House of Representatives. In a hearing on the Guam Elective Governor Act, Representative Richard White called attention to the proposed legislation's "require[ment of] a runoff election in the event that the leading candidate does not receive a majority of the votes," stating "I am not aware of any governorship in the United States that requires a runoff election in the event that the leading candidate does not receive a majority of the votes." *Guam--Elective Governor: Hearings Before the Subcomm. on Territorial and Insular Affairs of the H. Comm. on Interior and Insular Affairs*, 90th Cong. 12 (1968). Representative White asked Alberto T. Lamorena, a Guam attorney, "[D]o you prefer the majority-vote? . . . [D]o you want another runoff election or do you want the leading candidate to receive the office?" *Id.* Mr. Lamorena responded:

> Personally, especially so now that there seems to be three parties here in the island of Guam, personally I would prefer the majority-vote. I believe that the

> Governor should receive the mandate of a majority-vote, not a plurality vote as are being now enjoyed by other States or countries. To me I believe an endorsement of the majority is more proper than a mere plurality vote. I know that it's taxing to get a runoff election where the highest candidate running for that elective office gets merely the plurality of the vote. But it is, I believe, to me a better system that the one who has the highest office in Guam should receive the mandate of the majority.

Id.

Those exchanges illustrate Congress's awareness of the difficulties a majority-vote requirement could pose, including in a two-party system. With that knowledge, Congress nevertheless opted for the majority-vote requirement, placing Guam (and the Virgin Islands) outside the States' customary plurality requirements and practices. Although the hearings show specific consideration was given to accommodating three-party systems in place at the time in Guam and the Virgin Islands, had Congress intended for the majority-vote and runoff requirements to apply only when more than two named candidates appeared on the ballot, legislation could have tailored appropriately. Congress, in passing section 1422, expressed its view that specified officeholders in Guam should rule with the added legitimacy afforded by a victory from a majority. Given that objective, the proper course is to read section 1422 to require a majority achieved without cutting out a group of voters who unmistakably took part in the election contest.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

BRIAN J. FISCHER
JENNER & BLOCK LLP
919 Third Avenue
37th Floor
New York, NY 10022
(212) 891-1600

PAUL M. SMITH*
JENNER & BLOCK LLP
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000

Counsel for Petitioners
** Counsel of Record*

March 16, 2007

APPENDIX

DEC 19, 2006

APPENDIX A

IN THE SUPREME COURT OF GUAM

ROBERT A. UNDERWOOD and FRANK B. AGUON JR.
Petitioners,

vs.

THE GUAM ELECTION COMMISSION
Respondent,

FELIX P. CAMACHO and MICHAEL CRUZ,
Real Parties in Interest.

Supreme Court Case No.: WRM06-003

OPINION

Cite as: 2006 Guam 17

Argued and submitted on November 30, 2006
Hagatna, Guam

BEFORE: F. PHILIP CARBULLIDO, Chief Justice;
RICHARD H. BENSON, Justice *Pro Tempore;*
J. BRADLEY KLEMM, Justice *Pro Tempore.*

CARBULLIDO, C.J.:

Petitioners Robert A. Underwood and Frank B. Aguon, Jr. ("Underwood/Aguon") filed a Verified Petition for a Writ of Mandamus, requesting that this court order the Respondent Guam Election Commission "to comply with its non-discretionary duty and conduct a runoff as mandated by the Organic Act." In particular, Underwood/Aguon argue that the Real Parties in Interest Felix P. Camacho and Michael Cruz ("Camacho/Cruz") were improperly certified as winners of the 2006 gubernatorial election because the Commission failed to include overvotes in the total number of votes cast, in violation of the Organic Act. Underwood/Aguon argue that had the overvotes been included in the mathematical determination of whether Camacho/Cruz met the threshold requirement of 50% plus one vote, Camacho/Cruz would have in fact achieved less than the requisite majority, and as such, a runoff election would be required pursuant to the Organic Act.

Guam's Governor and Lieutenant Governor are elected pursuant to section 1422 of the Organic Act, which provides: "The Governor of Guam, together with the Lieutenant Governor, shall be elected by a majority of the votes cast by the people who are qualified to vote for the members of the Legislature of Guam." 48 U.S.C. § 1422. Consequently, the issue before us is whether the Commission properly excluded overvotes in determining whether the Camacho/Cruz team were "elected by a majority of votes cast," as such term is used in the Organic Act of Guam. 48 U.S.C. § 1422.

We hold that in order to determine whether a gubernatorial slate has been "elected by a majority of the votes cast," as such phrase is used in the Organic Act of Guam, only expressions of will or choice, or final selections of a gubernatorial slate, may be properly included in the total

number of votes cast. The converse of this rule is that the persons who overvote, or vote for both gubernatorial slates, do not express their will in deciding who should be the next Governor and Lieutenant Governor, and in doing so, they assent to the will of the voters who have properly expressed their will and duly participated in such election. Accordingly, we hold that the Organic Act requires that overvotes be excluded by the Commission for purposes of determining whether a gubernatorial slate has been "elected by a majority of votes cast." For this reason, we deny the Verified Petition for a Writ of Mandamus.

I.

On November 7, 2006, the Guam Election Commission conducted the General Election, *inter alia*, so that the voters of Guam could determine who shall be elected to the offices of Governor and Lieutenant Governor. Petitioners Underwood/Aguon ran on the Democratic ticket for Governor and Lieutenant Governor against the Real Parties in Interest, the Republican team of Camacho/Cruz.

According to the Commission's Summary Report prepared on November 13, 2006, the Underwood/Aguon team received 18,700 votes and the Camacho/Cruz team received 19,560 votes. Petitioner's Excerpts of Record ("ER") at 2 (Nov. 22, 2006). In this same report, the Commission reported 668 write-in votes which were not credited to either candidate, 657 undervotes and 504 overvotes.

It is undisputed that the Underwood/Aguon votes, Camacho/Cruz votes, and write-in votes must be included in the total number of votes cast ("the base") for purposes of mathematically determining whether Camacho/Cruz received the requisite majority. This amounts to a sum total of 38,928 votes. It is also undisputed that undervotes, or blank ballots,

are not to be included in the base. *Gutierrez v. Ada*, 528 U.S. 250 (2000), *rev g sub nom. Ada v. Gov't of Guam*, 179 F.3d 672 (1999).

Thus, the only issue in dispute with respect to determining whether Camacho/Cruz received a majority of votes cast is whether the 504 overvotes should be included in, or excluded from, the base. If the Commission excludes the overvotes, then the base, or pool of votes cast from which the calculation of a majority is made, results in the Camacho/Cruz team receiving 50.25% of the vote. If the Commission includes the 504 overvotes, then the Camacho/Cruz team will have garnered 49.60% of the vote, and in this case, a runoff election would have been required pursuant to the Organic Act.

The overvotes issue was presented to the Commission at its post-election meeting on November 9, 2006. At that time, counsel for the Commission submitted a legal opinion indicating that Guam law found at 3 GCA § 11114 requires that overvotes be excluded from the base for purposes of determining whether Camacho/Cruz garnered a majority of votes cast.

After excluding the overvotes from the base, the Commission certified the results of the election, and declared the Camacho/Cruz slate as the winner of the gubernatorial election.

The instant petition followed.

II.

This court has original jurisdiction over petitions for writs of mandamus pursuant to sections 1424-1(a)(2) and 1424-1(a)(3) of the Organic Act, codified at 48 U.S.C §§ 1424-1(a)(2), (a)(3) (Westlaw through Pub. L. 109-382 (2006)), and 7 GCA § 31202 (2005).

III.

A petitioner bears the burden of showing that a writ should issue. *People of Guam v. Super. Ct. (Bruneman)*, 1998 Guam 24 ¶ 3. The decision of whether to issue a writ of mandamus lies within the discretion of the court. 7 GCA § 31401; *see also Gray v. Super. Ct.*, 1999 Guam 26 ¶ 12.

The primary purpose of a writ of mandamus is to compel the performance of a legal duty. 7 GCA § 31202 ("[A writ of mandate] may be issued by any court . . . to any inferior tribunal, corporation, board, or person to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station; or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by such inferior tribunal, corporation, board, or person.") (alterations in original); *see, e.g., A.B. Won Pat Guam Intl Airport Auth. ("GIAA") v. Moylan*, 2005 Guam 5 ¶ 10.

As a general rule, mandamus will not lie to compel the exercise of discretion in a particular manner. *Holmes v. Territorial Land Use Comm'n*, 1998 Guam 8 ¶12. However, mandamus will issue to compel the performance of a statutorily required ministerial act. *Id.* ¶ 11 (observing that mandamus is appropriate where there is a "clear, present and ministerial duty to act . . . .").

IV.

Petitioners Underwood/Aguon contend that because overvotes should be counted for purposes of determining the base, a writ of mandate must issue ordering the Commission to conduct a runoff election as a result of the failure of any one slate to be "elected by a majority of votes cast," as such term is used in the Organic Act. 48 U.S.C. § 1422. For the

reasons stated below, we deny the instant petition for extraordinary relief.

A. Section 1422 of the Organic Act of Guam

"The Organic Act serves the function of a constitution for Guam." *GIAA*, 2005 Guam 5 ¶ 21 (quoting *Haeuser v. Dept of Law*, 97 F.3d 1152, 1156 (9th Cir. 1996); *see also People v. Perez*, 1999 Guam 2 ¶ 115 ("Until Guam creates its own Constitution, the Organic Act of Guam is the equivalent of Guam's Constitution.").

Section 1422 of the Organic Act provides, with respect to the election of the Governor and Lieutenant Governor of Guam:

> The Governor of Guam, together with the Lieutenant Governor, shall be elected by a majority of the votes cast by the people. . . . If no candidate receives a majority of the votes cast in any election, . . . a runoff election shall be held between the candidates for Governor and Lieutenant Governor receiving the highest and second highest number of votes cast.

48 U.S.C. § 1422.

Underwood/Aguon primarily rely on the Ninth Circuit case of *Ada v. Government of Guam*, 179 F.3d 672 (1999), in asserting that the phrase "votes cast" as used in the Organic Act necessarily includes overvotes, and for this reason, a runoff election is required. In opposition, Camacho/Cruz assert that the Ninth Circuit case is no longer good law, and more importantly, they contend that local law found at 3 GCA § 11114 defines the phrase "votes cast" to exclude overvotes, and therefore, the local law controls the disposition of the issue before us.

The issue before us is clearly an Organic Act issue. More specifically, we are tasked to consider the statutory

interpretation of the phrase "elected by a majority of the votes cast," as such phrase is used in the Organic Act. To this extent, we disagree with Camacho/Cruz's assertion that our inquiry must begin and end with the local law found at 3 GCA § 11114 (2005). This is because of the "well-established principle in this jurisdiction that the Guam Legislature cannot enact laws which are in derogation of the provisions of the Organic Act." *In re Request of Governor Felix P. Camacho Relative to the Interpretation and Application of Sections 6 and 9 of the Organic Act of Guam ("In re Request of Governor Camacho 2004")*, 2004 Guam 10 ¶ 33 (quoting H.R.Rep. No. 105-742 (1998), 1998 WL 658802 at *3); *see also In re Request of Governor Felix P. Camacho Relative to the Interpretation and Application of Section 11 of the Organic Act of Guam ("In re Request of Governor Camacho 2003")*, 2003 Guam 16 ¶ 15 n.5.

"We underscored this principle in *In re Request of Governor Gutierrez*, when we stated that 'the legislature may not enact a law encroaching upon the Governor's authority and powers which are mandated by the Organic Act.'" *In re Request of Governor Camacho 2004*, 2004 Guam 10 ¶ 33 (quoting *In re Request of Governor Carl T.C. Gutierrez, Relative to the Organicity and Constitutionality of Public Law 26-35*, 2002 Guam 1 ¶ 41).

The Ninth Circuit Court of Appeals also recognizes that Guam's self-government is "constrained by the Organic Act" and therefore, courts are compelled to "invalidate Guam statutes in derogation of the Organic Act." *Haeuser v. Dep't of Law*, 97 F.3d 1152, 1156 (9th Cir. 1996); *see also In re Request of Governor Camacho 2004*, 2004 Guam 10 ¶ 33. Thus, the Legislature's powers are broad, but are constrained by the provisions of Organic Act of Guam, and in turn, this court's interpretation of such law. "[T]he court must declare a legislative enactment unconstitutional if an analysis of the

constitutional claim compels such a result." *In re Request of Governor Gutierrez*, 2002 Guam 1 ¶ 41.

Consequently, only after construing the relevant Organic Act language *in its constitutional sense* may we then properly assess the constitutionality of 3 GCA § 11114 and its applicability to the issue before us.

1. Organic Act: "elected by a majority of the votes cast"

In construing the Organic Act provision that requires our Governor and Lieutenant Governor to be "elected by a majority of the votes cast" we find ample guidance in cases from the United States Supreme Court.

To begin with, in 1877, in the case of *County of Cass v. Johnston*, 95 U.S. 360 (1877), the Court established the following basic rule:

> This we understand to be the established rule as to the effect of elections, in the absence of any statutory regulation to the contrary. All qualified voters who absent themselves from an election duly called are presumed to *assent to the expressed will of the majority of those voting*, unless the law providing for the election otherwise declares.

Id. at 369 (emphasis added). The general principle which can be gleaned from this case is that where a voter does not express his will in an election, he assents to those voters who do.

In *Newberry v. United States*, 256 U. S. 232 (1921), the Court again recognized that inherent in the concept of an election is making a final choice of an officer:

> The Seventeenth Amendment, which directs that Senators be chosen by the people, neither announced

> nor requires a new meaning of election and the word now has the same general significance as it did when the Constitution came into existence — *final choice of an officer* by the duly qualified electors.

Id. at 254 (emphasis added).

Years later in *United States v. Classic*, 313 U. S. 299 (1941), the Court again recognized that an election is an expression of choice: "From time immemorial an election to public office has been in point of substance no more and no less than the expression by qualified electors of their choice of candidates." *Id.* at 318.

Similarly, in *Foster v. Love*, 522 U.S. 67 (1997), the Supreme Court invalidated a law permitting a primary in Louisiana in which the vote would end in no selection among Congressional candidates. The Court stated with respect to the use of the term "election" in federal statutes: "When the federal statutes speak of 'the election' of a Senator or Representative, they plainly refer to the combined actions of voters and officials meant to make *a final selection* of an officeholder. . . ." *Id.* at 71 (citing Noah Webster, An American Dictionary of the English Language 433 (C. Goodrich & N. Porter eds. 1869) (defining "election" as "the act of choosing a person to fill an office") (emphasis added)). In *Foster*, the Supreme Court clearly pronounced that to "elect" is to "choose."

More recently, in *Bush v. Gore*, *531* U.S. 98 (2000), the Court provided the following direction when it comes to defining a "vote." First, we are instructed that "[i]n certifying election results, the votes eligible for inclusion in the certification are the votes meeting the properly established legal requirements." *Id.* at 103. In overturning the Florida Supreme Court's order for a recount on the basis that the recount procedures violated equal protection, the

United States Supreme Court deferred to Florida law in its analysis. *Id.* at 116 (citing *Boardman v. Esteva*, 323 So. 2d 259, 268 n.5 (Fla. 1975) ("The election process . . . is committed to the executive branch of government through duly designated officials all charged with specific duties . . . [The] judgments [of these officials] are entitled to be regarded by the courts as presumptively correct . . . .") (alterations in original). Thus, under Florida law, the Court determined that a "legal vote" under Florida law is one in which there is a "clear indication of the intent of the voter." *Gore v. Harris*, 772 So. 2d 1243, 1257 (Fla. 2000) (quoting Fla. Stats. §§ 101.5614(5)-(6)(2000)), *rev'd by Bush v. Gore*, 531 U.S. 98 (2000).

These pronouncements of the United States Supreme Court are consistent in their views of an election and a vote, and they lend much guidance to the issue before us. Applying the above cases to the issue before us, we hold that in order to determine, in the constitutional sense, whether a gubernatorial slate has been "elected by a majority of the votes cast," only expressions of will or choice, or final selections of an officeholder, may be properly included in the total number of votes cast. More specifically, because the Organic Act concludes that the Governor and Lieutenant Governor be "elected" by a majority, that is, "finally selected" by a majority, it is a logical premise that *the base* from which such majority is determined includes only those votes which would similarly indicate "a final selection of an officeholder," as instructed by the Court in *Foster*, 522 U.S. at 71. *See also Newberry*, 256 U. S. at 250 (describing an election as a "final choice . . . by the duly qualified electors"); *Classic*, 313 U.S. at 318 (characterizing an election as "the expression by qualified electors of their choice of candidates."). Stated another way, those voters who have properly expressed a choice are the same voters

who should make up the base in determining whether, under our Organic Act of Guam, a candidate has been "elected by a majority of the votes cast by the people." 48 U.S.C. § 1422.

Like the voters in *County of Cass*, 95 U.S. 360, the 504 persons who overvoted, or voted for both gubernatorial slates, have not expressed their will in deciding who should be the next Governor and Lieutenant Governor. Accordingly, we hold that the 504 persons who did not express a choice or selection of a Governor and Lieutenant Governor in the November 7, 2006 General Election have assented to the will of those thousands of voters who have properly expressed their will and duly participated in such election.

In so holding, we construe the Organic Act to require that the Governor and Lieutenant Governor of Guam be elected by a "majority of all those who cared to make any choice among gubernatorial candidates." *Gutierrez*, 528 U.S. at 256. To hold otherwise would be to "impute to the Congress a strange preference for making it hard to select a Governor." *Id.* (rejecting the argument that "votes cast" means "ballots cast" because under such an interpretation of section 1422 "the statute could require a runoff . . . even though one slate already had a majority of all those who cared to make any choice among gubernatorial candidates.").

In light of our holding above, we reject Underwood/Aguon's argument that the actual marking of the ballot for both slates is an expression of some sort, either of protest against one team of candidates or of support for another team of candidates. Again looking to the United States Supreme Court for guidance, we are reminded of the familiar case of *Burdick v. Takashi*, 504 U.S. 430 (1992), where the Court stated eloquently that the election process is not meant to be a platform for expression of discontent or some other display. It is meant to choose between candidates:

> [T]he function of the election process is "to winnow out and finally reject all but the chosen candidates," not to provide a means of giving vent to "short-range political goals, pique, or personal quarrel[s]." Attributing to elections a more generalized expressive function would undermine the ability of States to operate elections fairly and efficiently.

Id. at 438 (quoting *Storer v. Brown*, 415 U.S. 724, 735 (1974) (second alteration in original). In other words, while an overvote may presumably stand for voter error or even connote a sense of discontentment with the final choice of candidates, the function of an election is to express one's will in the "selection of an officeholder" and not to express one's discontent.

2. Ninth Circuit Case: *Ada v. Government of Guam*

a. Treatment of Ninth Circuit precedent

It is appropriate at this juncture to discuss the circuitous path that Guam courts have taken in the development of *stare decisis*. To begin with, when the Supreme Court of Guam stood for the first time in 1996 as the first level appellate court of Guam,[1] the pronouncement was made that decisions of its predecessor entity, the District Court of Guam Appellate Division, would be considered non-binding authority. *People v. Quenga*, 1997 Guam 6 ¶ 13 n.4.[2] At

---

[1] *See generally* Guam Pub. L. 12-85 (July 1, 1974) ("Court Reorganization Act of 1974"); *Guam v. Olsen*, 431 U.S. 195 (1976); U.S. Pub. L. 98-454 § 709, 98 Slat. 1732 (October 5, 1984); Guam Pub. L. 21-147 (January 14, 1993); Guam Pub. L. 23-34 (June 28, 1995).

[2] In *People v. Quenga*, 1997 Guam 6 ¶ 14 n.4, we stated:

> It may go without saying, but this Court does not recognize the decisions of the Appellate Division as controlling our construction of law. We consider its opinions as precedent that

that time, and until 2004, the Ninth Circuit Court of Appeals retained reviewing jurisdiction over the Supreme Court of Guam on a *certiorari* basis. Our cases were thus reviewable by the Ninth Circuit Court of Appeals as the third step in the path of appellate review ending, as in all states, with the United States Supreme Court. With the historic passage of House Resolution 2400, in 2004, the *certiorari* review period of the Ninth Circuit was terminated, thus putting the Supreme Court of Guam on par with state supreme courts. Pub. L. No. 108-378, 118 Stat. 2206 (codified as amended in sections of 48 U.S.C. chap. 8A) (Oct. 30, 2004).

---

is binding upon the trial courts of Guam, but these decisions, like those of the Court of Appeals, are considered persuasive authority when we consider an issue. In providing for a Supreme Court of Guam, Congress adopted a model that puts Guam on a par judicially with the several States, which grants this Court the authority to interpret Guam's laws. The decisions of this Court will be reviewed in due time and course by the Supreme Court of the United States alone. *See* 48 U.SC. §§ 1424-2 (1994) (also providing a period of fifteen (15) years during which the Ninth Circuit Court of Appeals retains certiorari review of this Court's decisions). While we note our authority to modify pre-existing interpretations of our laws that have been determined by federal tribunals, the Appellate Division's opinion in *Herradura* does not present, on its face, any occasion for reconsideration. It appears well supported in law and well reasoned. The Appellant did not invite our attention to *Herradura* as a wrongly decided precedent. It should be underscored that the creation of the Supreme Court of Guam did not erase pre-existing case law. Precedent that was extant when we became operational continues unless and until we address the issues discussed there. We will not divert from such precedents unless reason supports such deviation. We choose to let *Herradura* stand, without our reaching the merits of the issue presented, because we see no reason to reconsider its conclusions.

As previously stated, the issue in the case *sub judice* involves an interpretation of the Organic Act of Guam. The Organic Act has the unique distinction of being Guam's *de facto* constitution, and, at the same time, a federal law. *See generally* 48 U.S.C. chap. 8A. This creates the anomalous situation wherein two separate and independent court systems — the federal and local courts — have original jurisdiction over questions arising under the Organic Act and could conceivably render opposing opinions. While a direct conflict is not likely, and is not the case in this instance, any such conflict between the federal and local court systems in interpreting our *de facto* constitution may be ultimately resolved by this nation's highest tribunal — the United States Supreme Court.

Under the principles of *stare decisis* as they exist in American jurisprudence, we do not regard the termination of the Ninth Circuit review as a termination of the precedential value of cases involving Organic Act issues that rose to the Ninth Circuit through the federal appellate process, as in the instant case, or through the local court appellate process during the Ninth Circuit review period. Rather, Ninth Circuit cases that address Organic Act issues will be binding on the trial courts of Guam to the extent that this court has not addressed such issues. Moreover, Ninth Circuit cases that address Organic Act issues will be followed by this court, insofar as such cases are reasonably supported by law. That is, because the Supreme Court of Guam is now the final arbiter of questions arising through the jurisdiction of the courts of Guam (short of final *certiorari* review by the United States Supreme Court), we recognize our authority to depart from Ninth Circuit cases interpreting the Organic Act of Guam only in the rare instance where we believe that such cases are unsupported by law.

b. The merits of the Ninth Circuit opinion

Underwood/Aguon rely heavily on the Ninth Circuit case of *Ada v. Government of Guam*, 179 F.3d 672, where the court held that "'a majority of the votes cast in any election' means that a gubernatorial slate must receive a majority of all votes cast in the general election, whether they be, with respect to the gubernatorial race, undervotes, overvotes, write-in votes, or votes for one of the slates." *Id.* at 678. In particular, Underwood/Aguon argue that while the United States Supreme Court reversed the Ninth Circuit opinion, the reversal only spoke to the issue of whether the term "any election" meant the gubernatorial election or the general election. We disagree.

First, the Ninth Circuit court's reference to overvotes was not necessary to the adjudication of the case. We therefore regard it as dicta. Dictum is "[a]n opinion expressed by a court, but which, not being necessarily involved in the case, lacks the force of an adjudication. . . ." Michael Sean Quinn, *Argument and Authority* in *Common Law Advocacy and Adjudication: An Irreducible Pluralism of Principles*, 74 Chi.-Kent L. Rev. 655, 710 (1999) (quoting *Grigsby v. Reib*, 153 S. W. 1124, 1126 (Tex. 1919); *In re Tuttle*, 291 F.3d 1238, 1242 (10th Cir. 2002) (describing dicta as "statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case at hand.") (quoting *Rohrbaugh v. Celotex Corp.*, 53 F.3d 1181, 1184 (10th Cir.1995)). "Such expressions of opinion, not in anywise necessary for the actual decision of any question before the court, are not controlling authorities in any sense, although they may at times have persuasive effect." *State ex rel. Anderson v. Hostetter*, 140 S.W.2d 21, 24 (Mo.1940); *see also Mun. of San Juan v. Rullan*, 318 F.3d 26, 28 n.3 (1st Cir. 2003) ("Dicta — as opposed to a court's holdings — have no

binding effect in subsequent proceedings in the same (or any other) case.") (citation omitted); *Dunn Constr. Co. v. Craig*, *3* So.2d 834, 835 (Miss. 1941) (stating that when an issue "is not before the Court, . . . any opinion expressed thereon is mere dictum not binding on any one."); *Medford v. Bd of Trustees*, 175 P.2d 95, 97 (Kan. 1946) ("Dicta and obiter dicta which go beyond the case may be respected but should not control a judgment in a subsequent case when the precise point is presented, argued and considered by the entire court."); *Buehler v. Bd. of Supervisors*, 183 N.E. 384, 386 (N.Y. 1932) (stating that when a statement made "was not necessary to the decision [it] is not binding upon this court").

The Ninth Circuit *Ada* case, where there were 609 overvotes, clearly was not argued and not decided on the issue of overvotes. 179 F.3d at 675. As stated at oral argument by counsel for Underwood/Aguon, Appellant Gutierrez in *Ada* did not need the 609 votes to prevail in the Ninth Circuit; he needed only the 1,313 blank ballots. Concededly, Appellee Ada needed both the undervotes and the overvotes to secure a runoff, but Ada was the appellee in the Ninth Circuit case, so the overvotes were irrelevant to the Appellee's position and therefore not relevant to the outcome. Therefore, since the 609 votes would not have been determinative in the *Ada* case, it fits squarely into the definition of dicta.

Only holdings that are necessary for the adjudication of a case should be treated as precedent. Quinn, *supra* at 711 (stating that "dicta could be anything not necessary to the resolution of the case"). In addition, while a holding may not address the main issue of the case, but still is necessary to reach a conclusion, then in that case, it also may be treated as precedent. *Id.* This is not the case with the Ninth Circuit's discussion regarding overvotes – overvotes were clearly not necessary to the adjudication of the case before it and the

references to overvotes can accordingly be regarded as dicta. "[I]f a court decides a point of law, after the adversarial parties have raised it and argued it and after the court has thought about it carefully, then it is binding on some range of courts (possibly including the court that decided the point) if it was a matter of some importance in the decided case." *Id.* at 684. Nevertheless, as with the issue of overvotes in *Ada*, when a court's statements are "not necessary to the actual holding of the case," then such "statements are properly considered dicta, and are not binding." *Kool, Mann, Coffee & Co. v. Coffey*, 300 F.3d 340, 355 (3rd Cir. 2002).

Second, we believe that upon review, the United States Supreme Court expressly rejected the Ninth Circuit's rationale which supports the inclusion of overvotes in determining the majority of the votes cast. In particular, the Court expressly rejected the Ninth Circuit's notion that the use of the term "votes cast" in the Organic Act means "ballots cast." *Gutierrez*, 528 U.S. at 255-56. Rather, in construing the phrase "majority of votes cast" in section 1422, the Court stated that when Congress used the term "votes" in the context of "votes cast," it undoubtedly meant "votes" and not "ballots." *Id.* The Court recognized:

> It would be equally odd to think that after repeatedly using "votes" or "vote" to mean an expression of choice for the gubernatorial slate, Congress suddenly used "votes cast in any election" to mean "ballots cast." And yet that is just what would be required if we were to treat the phrase respondents' way, for they read "votes cast in any election" as referring to "ballots containing a vote for any office." Surely a Congress that meant to refer to ballots, midway through a statute repeatedly referring to "votes" for gubernatorial slates, would have said "ballots." To argue otherwise is to tag Congress with an

> extravagant preference for the opaque when the use of a clear adjective or noun would have worked nicely. But even aside from that, Congress has shown that it recognizes the difference between ballots and votes in the very context of Guamanian elections. From 1972 until 1998, 48 U.S.C. § 1712 expressly required that the Guam Delegate be elected "by separate ballot and by a majority of the votes cast for the office of Delegate." There is simply no reason to think that Congress meant "ballots" when it said "votes" in § 1422.

Id. This holding lies directly contrary to the Ninth Circuit opinion wherein the court stated that "[a]dmittedly, this interpretation equates 'votes cast' with 'ballots cast.'" *Ada*, 179 F.3d at 677 n.5.

Importantly, to the extent that the Ninth Circuit's statement regarding overvotes remains viable, we nonetheless conclude that it is unsupported by law. That is, the Ninth Circuit case of *Ada v. Government of Guam* qualifies in this instance as a rare case where, due to unsound reasoning on the part of the Ninth Circuit Court of Appeals as discussed below, we must depart from, and ultimately reject, the Ninth Circuit Court's interpretation of the Organic Act of Guam.

This is because while the United States Supreme Court did not expressly address the issue of overvotes, the *rationale* employed by the Ninth Circuit in concluding that undervotes should be counted to determine the majority of the votes cast is *the very same rationale* used by that court to similarly count overvotes. This rationale, which equates "ballots" with "votes," was expressly overturned by the United States Supreme Court. *See Gutierrez*, 528 U.S. at 255-56.

Moreover, the Ninth Circuit court, in concluding that both undervotes *and* overvotes should be counted in determining whether a gubernatorial team achieved the requisite majority of votes cast, declined to apply the principles pronounced by the Supreme Court in *Cass*, 95 U.S. at 369 ("[T]he established rule as to the effect of elections in the absence of any statutory regulation to the contrary [is that a]ll qualified voters who absent themselves from an election duly called are presumed to *assent to the expressed will of the majority of those voting*, unless the law providing for the election otherwise declares.") (emphasis added). The Ninth Circuit further declined to apply the similar principle found in the Third Circuit case of *Todman v. Boschulte*, 694 F.2d 939 (3d Cir.1982), where the court agreed with a previously announced rule that "voters not attending the election or not voting on the matter submitted are presumed to assent to the expressed will of those attending and voting and are not to be taken into consideration in determining the result." *Id.* at 941 (quoting *Euwema v. Todman*, 8 V.I. 224, 224, 231 (D. VI 1971)). In doing so, the Third Circuit Court also failed to consider the Supreme Court cases which discuss the nature of the "vote" and the purpose of an "election." *See, e.g., Foster*, 522 U.S. at 71 (relying on federal statutes' references to an election as "actions of voters and officials meant to make a final selection of an officeholder"); *Newberry*, 256 U.S. at 250 (describing an election as a "final choice . . . by the duly qualified electors"); *Classic*, 313 U.S. at 318 (characterizing an election as "the expression by qualified electors of their choice of candidates.").

To interpret the relevant Organic Act language as the Ninth Circuit court has, especially in the face of clear guidance by the Supreme Court as to the definition of vote and the purpose of an election, would be to rewrite our

Organic Act, as the Ninth Circuit erroneously did in the *Ada* case. For these reasons, we find that the Ninth Circuit case is unsupported by law, and thus we exercise our aut ıority to depart from, and reject, the Ninth Circuit case to the extent that it has any remaining precedential value subsequent to its reversal by the United States Supreme Court.

3. *Smith* and other cases

Petitioners Underwood/Aguon also rely on the case of *Smith v. Board of Commissioners*, 65 N.W. 956 (Minn. 1896), where the issue was how to calculate a "majority of votes cast" on a referendum to change the county seat. In that case, the court held that unintelligible as well as intelligible ballots must be considered in determining the denominator from which to calculate the 55% majority. *Smith*, however, is of limited precedence because it is a referendum case, and as the Supreme Court in *Gutierrez*, instructs, "[r]eferendums are exceptions to the normal legislative process, and passage of a referendum is not itself essential to the functioning of government." 528 U.S. at 256.

Moreover, when presented with the reasoning in *Smith*, other cases have declined to follow it. For instance, in *State ex rel. Short v. Clausen*, *130* P. 479 (Wash. 1913), on a proposition to issue water bonds, the issue was whether to count unintelligible ballots as well as intelligible ones. There, the court declined to follow *Smith*, 65 N.W. 956, and held that only those ballots which clearly express the voter's choice can count. That case reasoned that only ballots that reflect the voter's choice can be counted as for or against the proposition. 130 P. at 480.

In yet another case, *State ex rel. Consolidated School District v. Smith*, 109 S.W.2d 857 (Mo. 1937), in determining whether undervotes or overvotes would be included in the aggregate number of votes cast in an election to authorize

school board bonds, the court held that both undervotes and overvotes are not included. On the same reasoning we adopt here, since an undervote reflects no choice any more than does an overvote, that neither should be counted. The Missouri court held that the term "votes" required "showing a preference either in the affirmative or negative for the proposition voted on." *Id.* at 858.

However, as pointed out by the Supreme Court in *Gutierrez* in response to the argument that passing a referendum requires a majority of voters going to the polls and not a majority of persons voting in a particular referendum issue: "[T]here is no uniform rule, and even if there were, treatment of referendums would not be a plausible model for elections of officials." 528 U.S. at 256 (citations omitted).

We therefore place no weight on Underwood/Aguon's reliance on the *Smith* case on this issue, primarily because the case involved a referendum, and in the *Gutierrez* case, the Supreme Court has instructed us to deal with referendums differently. *See* 528 U.S. at 256. Beyond that, *Smith* appears to be an anomaly, a case where the determination of a "majority" is simply deviated from by other cases faced with the same issue. *See also Stembredge v. Newton*, 99 S.E.2d 133, 134 (Ga. 1957); *Port of Palm Beach Dist. v. State*, 22 So. 2d 581, 582 (Fla. 1945).

B. Constitutionality of 3 GCA § 11114

Having defined the phrase "elected by a majority of the votes cast" in the constitutional sense, we next consider whether 3 GCA § 11114 (2005) is in conflict with such definition.

An analysis of the constitutionality (or organicity) of a local statute "must begin with the general rule that legislative enactments are presumed to be constitutional." *In re Request*

of Governor Gutierrez, 2002 Guam 114 1; *In re Request of Governor Camacho 2004*, 2004 Guam 10 ¶ 33.

A party challenging the constitutionality of a local law bears the burden of establishing its unconstitutionality. *In re Request of Governor Gutierrez*, 2002 Guam 1 ¶ 41("[H]e who alleges the unconstitutionality of an act bears the burden of proof . . . [and] the validity of acts is to be upheld if at all possible with all doubt resolved in favor of legality and unconstitutionality will be decreed only when no other reasonable alternative presents itself. . . .")

In this case, Underwood/Aguon bears the burden of establishing that 3 GCA § 11114 lies in violation of the Organic Act of Guam.

Title 3 GCA § 11114, entitled "Ballot, Invalid Portions Rejected; Blank Ballots and Improperly Marked Ballots are Not 'Votes Cast' for Calculating a Majority," states:

> If a voter indicates either:
>
> (a) by placing the voter's marks in the voting ovals or other spaces adjacent to the names of any candidates or nominees;
>
> (b) by writing the names of persons for an office in the blank spaces, or
>
> (c) by a combination of both, the choice of more than there are candidates or nominees to be elected or certified for any office, or if for any reason it is impossible to determine the voter's choice for any office, the voter's ballot shall not be counted for that office, but the rest of the voter's ballot, if properly marked, shall be counted. *A ballot that is blank, or that is marked* with *more candidates or nominees than are to be nominated or elected, is not to be included as apart of the base for determining*

> *what constitutes a majority in each election requiring a candidate or nominee to garner a majority of votes in order to be nominated or elected.*

(Emphasis added.)

The above statute clearly requires the Commission to exclude overvotes from the base in its determination of what constitutes a majority in any election,[3] and therefore, we find that section 11114 is not inconsistent with section 1422 of the Organic Act of Guam. In particular, the exclusion of overvotes is not inconsistent with our holding above that "in order to determine, in the constitutional sense, whether a gubernatorial slate has been 'elected by a majority of the votes cast,' only expressions of will or choice, or final

---

[3] In fact, most states have enacted legislation which does not al low a vote to be counted if the will of the voter cannot be ascertained. We were reminded of this in *Bush v. Gore,* 531 U.S. 98 (2000), where in his dissent, Justice John Paul Stevens noted that the United States Supreme Court had "never before called into question the substantive standard by which a State determines that a vote has been legally cast." *Id,* at 125. In making this observation, Justice Stevens notes that the majority of states have adopted statutes which "apply either an 'intent of the voter' standard or an 'impossible to determine the elector's choice' standard in ballot recounts." *Id.* at 125-26. He further noted that there were statutes in Arizona, Connecticut, Indiana, Maine, Maryland, Massachusetts, Michigan, Missouri, Texas, Utah, Vermont, Virginia, Washington and Wyoming which will not count votes where the "intent of the voter" cannot be ascertained, and that Alabama, Alaska, Arizona, California, Colorado, Delaware, Idaho, Illinois, Iowa, Maine, Minnesota, Montana, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee and West Virginia all had statutes refusing to count a vote if it is "impossible to determine" the intent of the voter. *Id.* at 124 n.2. At issue in the *Bush v. Gore* case was the Florida statute which defined a vote as "a clear indication of the intent of the voter ." *See Gore v. Harris,* 772 So. 2d 1243 (2000).

selections of an officeholder, may be properly included in the total number of votes cast." *See* ¶ *29.*

Again here, the primary support relied upon by Underwood/Aguon in challenging the above statute is the Ninth Circuit opinion. Because we have declined to follow what is left of the Ninth Circuit opinion, we hold that Petitioners Underwood/Aguon have failed to establish the unconstitutionality of the local law which, as it stands today with respect to the exclusion of overvotes in the determination of a majority of votes cast is not inconsistent with the relevant provision of section 1422 of the Organic Act as defined in the constitutional sense.[4]

V.

We hold that in order to determine whether a gubernatorial slate has been "elected by a majority of the votes cast," as such phrase is used in the Organic Act of Guam, only expressions of will or choice, or final selections of an officeholder, may be properly included in the total number of votes cast. The converse of this rule is that the 504 persons who overvoted, or voted for both gubernatorial slates, have not expressed their will in deciding who should be the next Governor and Lieutenant Governor, and have thereby assented to the will of those thousands of voters who have properly expressed their will and duly participated in such election. Accordingly, we hold that the Organic Act requires that overvotes be excluded by the Commission for

---

[4] We also reject Underwood/Aguon's related argument that 3 GCA § 11114 should not be complied with because of the Commission's historical practice of not including overvotes in determining whether a gubernatorial slate has garnered the requisite majority. We agree with Camacho/Cruz that failure to enforce the law in prior elections does not forgive the failure to follow the law in this election.

purposes of determining whether a gubernatorial slate has been "elected by a majority of votes cast."

The Verified Petition for a Writ of Mandamus ordering the Commission to conduct a runoff for failure of the Camacho/Cruz team to be elected by a majority of the votes cast is hereby

DENIED.

APPENDIX B

CABOT MANTANONA LLP
MEMORANDUM

TO: Frederick J. Horecky, Chairman
Guam Election Commission

Gerald A. Taitano, Executive Director
Guam Election Commission

FROM: Cesar C. Cabot, Esq.
Legal Counsel

DATE: November 9, 2006

SUBJECT: Interpretation of the Term "Majority of Votes Cast" Pursuant to the Organic Act of Guam, 48 U.S.C. § 1422 and 3 GCA § 11114(c)

Our office has been instructed to provide the following legal opinion.

I. FACTS

The 2006 General Election was held to elect, among others, the Governor and Lt. Governor of Guam on November 7, 2006. The ballots were duly tabulated and the unofficial results are as follows:

NAME	NO. OF VOTES
a. Camacho-Cruz	19,552
b. Underwood-Aguon	18,688
c. write-in votes	668
d. number of over votes	504
e. number of under votes (blank ballots)	657

II. ISSUE

What shall constitute a "majority of votes cast" pursuant to the Organic Act of Guam (48 U.S.C. § 1422) and 3 GCA § 11114, in determining the requisite number of votes to declare the winner of the Gubernatorial/Lt. Gubernatorial race during the 2006 General Election?

III. APPLICABLE LAW AND DISCUSSION

The Organic Act of Guam, 48 U.S.C. § 1422 (hereafter "Organic Act") provides for the election of the Governor and Lt. Governor, in relevant part, as follows:

> **§ 1422. Governor; Lieutenant Governor: Powers, Duties:**
>
> The executive power of Guam shall be vested in an executive officer whose official title shall be the "Governor of Guam." *The Governor of Guam, together with the Lieutenant Governor, shall be elected by a majority of the votes cast by the people who are qualified to vote for the members of the Legislature* of Guam. The Governor and Lieutenant Governor shall be chosen jointly, by the casting by each voter of a single vote applicable to both offices. *If no candidate receives a majority of the votes cast in any election, on the fourteenth day thereafter a runoff election shall be held* between the candidates for Governor and Lieutenant Governor receiving the highest and second highest number of votes case.***

Title 3 Guam Code Annotated § 11132 entitled "Declaration of Results," provides that "immediately after completion of the tabulation of all election results, the Commission shall declare elected to each office the person

having the largest number of votes for that office." Further, 3 GCA § 11114(c) reads in pertinent part as follows:

> **§ 11114. Ballot, Invalid Portions Rejected; Blank Ballots and Improperly Marked Ballots are Not 'Votes Cast" for Calculating a Majority.**
>
> If a voter indicates either:
>
> (a) by placing the voter's marks in the voting ovals or other spaces adjacent to the names of any candidates or nominees;
>
> (b) by writing the names of persons for an office in the blank spaces, or
>
> (c) by a combination of both, the choice of more than there are candidates or nominees to be elected or certified for any office, or if for any reason it is impossible to determine the voter's choice for any office, the voter's ballot shall not be counted for that office, but the rest of the voter's ballot, if properly marked, shall be counted. *A ballot that is blank, or that is marked with more candidates or nominees than are to be nominated or elected, is not to be included as a part of the base for determining what constitutes a majority in each election requiring a candidate or nominee to garner a majority of votes in order to be nominated or elected.* 3 GCA § 11114 (Emphasis added).[5]

It is important to note that § 11114 was amended by P.L. 25-146 on May 27, 2000, and the instant application of

---

[5] **SOURCE**: gc § 2614, as reenacted by P.L. 11-209; amended by P.L. 12-149. Amended by P.L. 25-146.46. **Compiler's note:** The wording of this Section was amended to reflect the holding in *Gutierrez v. Ada*, U.S. Supreme Court, reversing District Court of Guam and 9th Circuit Court of Appeals by a unanimous decision. 000 U.S. 99-51 (2000).

§ 11114(c) is a matter of first impression with the GEC. Applying the relevant sections of the Organic Act, with Sections 11114(c) and 11132, mandates that blank ballots and over-votes are not to be included in determining the requisite majority threshold to be elected.

The Guam Election has repeatedly taken the position that its role is ministerial in nature, and that it is duty bound to administer the laws as it is written. *See* 3 GCA §§ 2102, 2103 and 2106. The GEC was created by the Legislature, and can only exercise powers conferred upon it by the Legislature. 3 GCA § 2101.

As creatures of the Legislature, the GEC has no common law or general powers, but only those conferred upon it by statute. *See Ada v. Guam Telephone Authority*, 1999 Guam, 10, ¶ 11 ("Administrative agencies and their executive officers are creatures of statute and delegates of the Legislature. Their power is dependent upon statute, so that they must find within the statute warrant for the exercise of any authority which they claim. They have no general or common-law powers but only such as have been conferred upon them by law expressly or by implication.") (quoting *Francis O. Day Co., Inc. v. The West Virginia Reclamation Board of Review*, 424 S.E. 2d 763, 766-766 (W.Va. 1992).

The Guam Election Commission may act only to implement their charter as it is written in and given to them by the Legislature. *Wade v. Taitano*, 2002 Guam 16 ¶ 7. An administrative agency does not have the authority to ignore its own valid rules. *Wade* at ¶ 7.

It is therefore legal counsel's opinion that the GEC is bound to follow Section 11114(c) by deducting the aggregate number of blank ballots and over-votes, from the final tally, in determining the majority required to elect a gubernatorial team during the General Election. In short, blank ballots and

over-votes (ballots marked with more candidates than are to be elected) are not to be included in determining the majority of votes cast required under the Organic Act.

This appears to be in accord with the U.S. Supreme Court's ruling in *Gutierrez v. Ada*, 528 U.S. 250 (2000) (blank ballots excluded from the "votes cast" computation. "There is simply no reason to think that Congress meant 'ballots' when it said 'votes' in § 1422.") *Id.* at 256.

I hope this meets the satisfaction of the Commission. If you have any questions or comments, feel free to contact me.

CESAR C. CABOT

/s/ Cesar C. Cabot
Legal Counsel

CCC:me
MEMORANDUM110906